Chong Chee Khong & Anor v Ng Yeow Hin

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-128 OF 1990
KAMALANATHAN RATNAM JC
3 JULY 1997

Damages (Personal Injury or Death) *— Personal injuries — Multiple injuries — Whether justifiable for global award to be divided into separate categories — Overlapping — Medical expenses — Loss of earnings — Loss of earning capacity*

On 1 June 1990, the first plaintiff was riding a motor cycle with the second plaintiff as pillion along Jalan Seremban/Kuala Lumpur when they were collided into by a motor car driven by the defendant. The defendant conceded total liability against both plaintiffs.

The first plaintiff claimed for injuries sustained to his head and various parts of his anatomy from the accident. He was unable to squat fully, stand on his right leg alone for too long, run and he walked with a limp. The orthopaedic surgeon said that the first plaintiff would require a hip replacement operation in the future. The first plaintiff had transferred from University Hospital, a government hospital, to Tawakal Hospital, a private hospital, alleging that University Hospital had failed to treat an injury to his right leg. He claimed for the medical expenses incurred. He also said that he was employed as a shoemaker prior to the accident where he earned RM1,200 a month. After the accident, he did not work for a year. Subsequently, he was unable to get the same salary and claimed for loss of earnings. There was no documentary evidence to prove his earnings.

The second plaintiff's medical report stated that, on admission, he was restless, having had loss of consciousness and amnesia. A neurosurgeon confirmed that he suffered from vasomotor instability characterized by headaches and giddiness, aggravated by hot afternoons. He ran a 30% chance of developing seizures and his lack of concentration had impaired his work. The second plaintiff claimed that he was earning RM1,500 before the accident compared to the RM500 he was earning currently. He too had no documentary evidence to prove his income. He claimed damages for the injuries sustained and his loss of earnings.

Held, allowing the claim:

(1) It is reasonable to make a global award in cases of claims for injuries. However, since the first plaintiff had suffered injuries to different parts of the anatomy, it was justifiable to break up the award to various categories before the process of overlapping could be applied. With regard to the injuries to the first plaintiff, he was awarded a total sum of RM56,000 before applying the process of overlapping. After taking into account overlapping, he was awarded the sum of RM50,000.

A sum of RM9,000 and RM750 was awarded to the first plaintiff for costs of future operations and other specials respectively.

The first plaintiff's claim for medical expenses incurred in the private hospital was rejected because he did not provide any report or letter from the hospital to prove that an injury to his right leg was not attended to by the government hospital.

It was more probable that the first plaintiff was earning a figure of RM700 a month before the accident. Therefore, he was awarded RM8,400 for the one year that he was unemployed.

There was no loss of future earnings as he was earning the same amount as he was before the accident. However, the use of the words 'whatever be the label attached to it' in s 28A(2)(c)(i) of the Civil Law Act 1956 allows for an award of loss of earning capacity notwithstanding the fact that evidence discloses no loss of future earnings. Therefore, the first plaintiff was awarded RM36,000 for loss of earning capacity, at RM300 for ten years (see pp 794D–I, 795A–D, 796C–H and 797B–F).

(2) The second plaintiff was awarded a sum of RM35,000 for his head injury. The second plaintiff was not gainfully employed and was a student at the time of the accident. He could not give evidence to support his claim that he was earning RM1,500 per month at that time. He could not, therefore, be awarded for loss of actual earnings or loss of earning capacity. He was awarded RM250 for other specials (see pp 798D–I and 799A).

[Bahasa Malaysia summary

Pada 1 Jun 1990, plaintiff pertama sedang menunggang motosikal dengan plaintif kedua sebagai pembonceng di Jalan Seremban/Kuala Lumpur bila mereka dilanggar oleh sebuah motokar yang dipandu oleh defendan. Defendan telah mengaku liabiliti sepenuhnya ke atas kedua-dua plaintif.

Plaintif pertama menuntut pampasan untuk kecederaan yang dialami ke atas kepalanya dan bahagian lain tubuhnya akibat daripada kemalangan tersebut. Beliau tidak dapat bertinggung, berdiri atas kaki kanan sahaja untuk terlalu lama, berlari and berjalan dengan tempang. Doktor bedah ortopedik berkata bahawa plaintif pertama akan memerlukan pembedahan penggantian pinggul pada masa depan. Plaintif pertama yang telah bertukar dari Hospital Universiti, sebuah hospital kerajaan, ke Hospital Tawakal, sebuah hospital swasta, mengatakan bahawa Hospital Universiti telah gagal mengubati suatu kecederaan ke atas kaki kanannya. Beliau menuntut perbelanjaan perubatan yang ditanggungnya. Beliau juga berkata bahawa dia bekerja sebagai seorang pembuat kasut sebelum kemalangan tersebut di mana dia dibayar RM1200 sebulan. Selepas kemalangan tersebut, beliau tidak boleh mendapat gaji yang sama dan menuntut kehilangan mata pencariannya. Tidak terdapat sebarang bukti dokumentar untuk membuktikan yang beliau memperolehi pendapatan ini.

Laporan perubatan plaintif kedua menyatakan bahawa beliau resah selepas hilang kesedaran dan ingatannya. Seorang doktor bedah neuro mengesahkan bahawa beliau mengalami ketidakstabilan vasomotor yang berciri sakit kepala dan kepeningan, diterukkan lagi oleh hari yang panas. Beliau ada 30% peluang mengalami serangan yang tiba-tiba dan penumpuannya telah mengurangkan kecekapan kerjanya. Plaintif kedua mendapat gaji sebanyak RM1,500 sebelum kemalangan tersebut berbanding dengan RM500 sekarang. Beliau juga tidak mempunyai bukti dokumentar untuk membuktikan gajinya. Beliau menuntut pampasan untuk kecederaan yang dialaminya dan kehilangan mata pencariannya.

Diputuskan, membenarkan tuntutan:

(1) Ia adalah munasabah untuk memberi award menyeluruh di dalam kes-kes tuntutan untuk kecederaan. Walau bagaimanapun, oleh kerana plaintif pertama telah mengalami kecederaan ke atas bahagian berlainan tubuhnya, ia boleh dijustifikasikan untuk membahagikan award tersebut kepada beberapa kategori sebelum proses bertindan digunakan. Mengenai kecederaan plaintif pertama, beliau diberi award berjumlah RM56,000 sebelum menggunakan proses bertindan. Selepas menimbangkan pertindanan, beliau diberi award RM50,000.

Jumlah sebanyak RM9,000 dan RM750 diberi kepada plaintif pertama untuk kos-kos pembedahan masa depan dan lain-lain perubatan khas masing-masing.

Tuntutan plaintif pertama untuk perbelanjaan perubatan yang ditanggungnya di hospital swasta tidak dibenarkan kerana beliau tidak membekalkan sebarang laporan atau surat daripada hospital tersebut untuk membuktikan bahawa kecederaan ke atas kaki kanannya tidak diubati oleh hospital kerajaan tersebut.

Ia adalah lebih berkemungkinan yang plaintif pertama mendapat gaji RM700 sebulan sebelum kemalangan tersebut. Oleh itu, beliau diberi award RM8,400 untuk satu tahun yang beliau menganggur.

Tidak terdapat kehilangan mata pencarian masa depan kerana beliau mendapat gaji yang sama sekarang seperti gajinya sebelum kemalangan tersebut. Walau bagaimanapun, penggunaan perkataan-perkataan 'whatever the label attached to it' dalam s 28A(2)(c)(ii) Akta Undang-Undang Sivil 1956 membenarkan award kehilangan mata pencarian walaupun pada hakikatnya keterangan tidak mendedahkan kehilangan mata pencarian masa depan. Maka, plaintif pertama diberi award RM36,000 untuk kehilangan keupayaan mencari gaji, sebanyak RM300 untuk sepuluh tahun (lihat ms 794D–I, 795A–D, 796C–H dan 797B–F).

(2) Plaintif kedua diberi award sebanyak RM35,000 untuk kecederaan kepalanya.Plaintif kedua tidak digaji dan adalah pelajar pada masa kemalangan tersebut berlaku. Beliau tidak dapat memberi

bukti untuk menyokong tuntutannya bahawa beliau mendapat gaji RM1,500 sebulan pada masa itu. Oleh itu, beliau tidak boleh diberi award untuk kehilangan mata pencarian atau kehilangan keupayaan mencari gaji.Beliau diberi award RM250 untuk perubatan khas lain (lihat ms 798D–I dan 799A).]

Notes

For cases on personal injuries, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 389–689.

Cases referred to

Chong Kam Siong v Herman bin Baharuddin 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1262 (refd)
Chua Tek Lah v Chua Seow Cher [1988] 1 MLJ xxxvi (refd)
Gan Kiam Beng v Haji Senan [1987] 2 MLJ xxi (refd)
Ismail bin Haji Manap & Anor v Onn Swee Imm [1992] 2 CLJ 1157 (refd)
Khairul Anuar bin Abu Bakar v Lim Eng Choon 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1260 (refd)
Lee Eng Beng & Anor v Torairajah & Ors [1987] 1 MLJ 121 (refd)
Letchumiah Aplasamy v Mara Express Bhd & Anor 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1075 (refd)
Peraganathan a/l Karpaya v Choong Yuk Sang & Anor [1996] 1 CLJ 622 (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42 (folld)
Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad [1985] 1 MLJ 50 (refd)
Tiang Cheong Fu v Tan Meng Yoke 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1282 (refd)
Tominam bte Tukimin v Toh Kai Chup [1985] 2 MLJ 345 (refd)
Wong Yeen Pen v Sharifudin bin Yusof [1989] 2 CLJ 1098 (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(c)(i)
Evidence Act 1950 s 114(g)

Manikam Avadiar (*Manikam Avadiar & Co*) for the plaintiffs.
Andrew Khoo (*Khoo & Sidhu*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:

Background

On 1 June 1990, the first plaintiff was riding motor cycle BCF 9524 with the second plaintiff as pillion along Jalan Seremban/Kuala Lumpur when they were collided into by motor car NL 8628 driven by the defendant.

The writ was filed on 28 November 1990 and the defence on 27 February 1991. Since then this case, like the fate of many others of its kind, lay dormant with neither party making any moves to have the case heard.

Case management

Having set this case down for case management, parties appeared before me on 29 January 1997 when I fixed this case for hearing to 16 and 17 June 1997. On the day of the hearing, the defendant conceded total liability as against both plaintiffs. I was to decide on both general damages and loss of earnings.

Evidence

The first plaintiff gave evidence on his behalf and stated that prior to the accident, he was employed as a shoemaker. He earned RM1,200 per month and this depended on the number of shoes he could manufacture each day. However, he was able to manufacture between 20 to 30 pairs of shoes per day and was paid RM2.50 per pair of shoes completed. He did not contribute to the Employees Provident Fund (EPF) as he was engaged on a contract basis. After the accident he did not receive any payment for a year. After the first year, he went back to his previous employer, but the latter refused to engage him due to his injuries. He then obtained a light job wherein he was paid RM300 per month for two years. From there, he obtained his present employment where, notwithstanding the fact that he was doing the same light job of obtaining orders, he is being paid RM700 per month. He therefore told the court that he was claiming RM600 (should have been RM500) as loss of earnings because he was unable to get the earlier salary of RM1,200. Referring to the report on him from the orthopaedic specialist ('Dr Teo's report'), he said he was admitted to University Hospital for six weeks.

Under cross-examination, he stated he was 20 years old at the time of the accident. He stopped schooling when he was in Form 5 and immediately commenced his apprenticeship as a shoemaker in a different factory. Prior to the accident, he was employed by Leong Yin Ho Shoemaker for about six months where he worked six days a week and was paid monthly. However, he had no documentary evidence to prove his earnings as he did not sign any vouchers when receiving the money. He did not pay income tax. After the accident, he was working in 'Exclusive Enterprise' wherein he was paid RM300 per month. The light work he was engaged in was to issue bills and orders. Subsequently, he was engaged by 'Ware Enterprise' wherein he was paid RM700 per month. He worked initially as an apprentice for two years and received RM10 per day. He denied the defence's suggestion that he was only earning RM700–RM800 per month and not RM1,200 at the time of the accident.

Referring to the medical bills he paid to Tawakal Hospital, which is a private hospital, he said that he had to go to Tawakal Hospital because University Hospital did not attend to an injury to his right leg. When shown Dr Teo's report wherein Dr Teo had recorded that the plaintiff had

A stated that since the recovery from his injuries he had returned to his former job, he explained that what he had actually meant was that he had returned to the job of a shoemaker, and not that he had returned to the former employer under whom he had received RM1,200 per month.

The second plaintiff confirmed that he was examined by a B neurosurgeon ('neuro report') and by an orthopaedic surgeon ('ortho report') and that his present condition is as stated in the said reports. His father had died when he was 13 years old. Since his mother's income was insufficient for the family, he worked part time after school. He went to school from 7am to 12.30pm and worked from 2pm to 8pm. He was in Form 5 at the time of the accident. He too said that he worked for the C same Leong Yin Ho Shoemaker, but as a salesman. He was paid a basic salary of RM700 per month and a travelling allowance of RM300. He also received about RM500 as commission. His total income per month was about RM1,500. He worked seven days in the week. After the accident, he did not received any payment for one year. He never returned to school D after the accident. He was unable to go back to his previous job due to his injuries. Since the accident, he worked as a cleaner and earned about RM400 per month until the end of December 1995 when, on 1 January 1996, he became an insurance agent, receiving RM500 per month as commission. There were months when he received nothing as he had no clients. He thus claimed RM1,000 per month as loss of earnings.

E Under cross-examination, the second plaintiff also admitted that he had no documentary evidence to show his income of RM1,500 per month before the accident. Coincidentally, he too had worked for Leong Yin Ho Shoemaker for six months prior to the accident. His commission depended on the number of shoes that he sold to the shops in the shopping complexes. F He confirmed that his employer would have the invoices to substantiate his sales. He was the only salesman at that time. After the accident, he had also worked for his brother and he was paid RM50 per week and not per day. When he was challenged with the statement he had made to Dr Arumugasamy in the neuro report wherein he went on record as having said that his brother had paid him RM50 per day, he denied it was G payment per day. When confronted with Dr Teo's ortho report on him wherein he had told Dr Teo that, since recovery from his injury, he had left school and had started work as a salesman, he said that that part of Dr Teo's report, was incorrect.

Both the plaintiffs then called the said manufacturer, Leong Yin Ho H (PW3), to testify. Mr Manikam attempted to tender a document through the witness which he said was the licence of PW3 to manufacture shoes. Since all documents had to be agreed and admitted or disputed during the case management stage, and since this document was never produced at that stage, I disallowed the admission of any piecemeal introduction of documentary evidence as it defeats the very purpose and intent of case I management. In any case, no evidence was led as to why this document could not have been produced earlier during the case management stages.

The witness then reiterated the earlier evidence of both the plaintiffs. Under cross-examination, he said that he was employed as a shoemaker

for 30 years before he became an employer himself for the last ten years. He agreed that the manufacture of shoes was a highly skilled business and that it would usually take about eight months for an apprentice to become a shoemaker. Although he had ten workers and one salesman, yet he did not have any records of any of the workers in 1990. He paid income tax and employed an accounts clerk to prepare his accounts. He admitted having issued a letter in respect of the first plaintiff wherein he had said that the monthly wages paid to the first plaintiff was RM1,000. When asked why he did not issue a similar letter in respect of the second plaintiff, his answer was that he had negligently left out the name of the second plaintiff. He denied the suggestions that the first plaintiff was only paid RM700, and that the second plaintiff was not employed by him at all.

The first plaintiff

The first plaintiff sustained the following injuries:

(a) Head injury.

(b) Close bilateral fracture mandible.

(c) Close comminuted fracture (R) femur.

(d) Close fracture (R) acetabulum with central dislocation.

(e) (R) Sciatic nerve palsy.

(f) Close fracture medial condyle (R) femur.

(g) Close undisplaced fracture (L) wrist.

With regard to the head injury, the medical report from University Hospital stated that, after a 24-hour observation, he had completely recovered from his head injury. The orthopaedic surgeon of University Hospital opined that the right femoral head would go into avascular necrosis and together with the malunited fractured acetabulum would cause a lot of pain and limitation of hip movements and that he would need further surgery in the future.

He was seen by Dr Teo on 27 April 1993, that is about two years and ten months after the accident. Dr Teo's report was to the effect that the first plaintiff walked with a limp, had a true shortening of 2 cm of his right lower limb with generalized wasting, had surgical scars of 32 cm and 10 cm in length at the lateral and medial aspect of the right thigh and further scars measuring 21 cm and 29 cm on the posterior aspect of his right thigh and right gluteal region.

His report further states that the fractured acetabulum with central dislocation of the right hip joint, the fractured right femur and fractured medial condyle of the right femur had healed with pain and limitation of movement of the right hip joint. There was limitation of flexion and external and internal rotation. He however had full flexion of his right knee joint and full range of movement of his right ankle joint. Functionally, he walked with a limp on the right side. He was unable to squat fully due to the limitation of flexion of his right hip joint. He was also unable to stand on his right leg alone for too long and he was unable to run.

The fractured left wrist and mandible had healed with no residual disability.

X-ray of the pelvis showed a malunited fracture of the right acetabulum with a plate and screws in position. The right femoral head appeared to be irregular in shape with loss of normal right hip joint space. X-ray of the right femur showed a healed fracture of the shaft of the right femur with a plate and screws in position. The healed fracture of the medial condyle of right femur showed two screws in position.

Dr Teo was of the opinion that the above stated disabilities were permanent having resulted from the accident. In addition, he opined that secondary osteoarthritis of his right hip joint had developed as a result of the severe trauma to his right hip. He also concluded that the first plaintiff would require a hip replacement in the future costing about RM9,000 including hospitalization.

Mr Manikam for the plaintiff submitted under various items. For the closed communicated fracture of (R) femur with close fracture medial condyle (R) femur and with the (R) sciatic nerve palsy with 2 cm shortening, he submitted RM40,000. He relied on *Lee Eng Beng & Anor v Torairajah & Ors* [1987] 1 MLJ 121 where, for 1 cm shortening, the then Federal Court upheld the trial judge's award of RM31,500. He also relied on *Letchumiah Aplasamy v Mara Express Bhd & Anor* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1075 where for a compound fracture of the tibia and fibula with 1.5 cm shortening and with osteorthritis, a sum of RM40,000 was awarded.

In respect of the fractured (R) acetabulum with central dislocation and with the residuals, the plaintiff prayed for RM30,000 and relied on *Chong Kam Siong v Herman bin Baharuddin* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1262 where, for similar injuries, James Foong J awarded RM39,000.

For the operational scars and osteoarthritis, the plaintiff asked for RM5,000. In respect of the bilateral fracture of the mandible, I was referred to *Tiang Cheong Fu v Tan Meng Yoke* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1282 where the District Judge in Singapore awarded S$8,000 each for the fracture of the right and left mandible. The plaintiff thus prayed for RM14,000. For the wrist injury, relying on *Ismail bin Haji Manap & Anor v Onn Swee Imm* [1992] 2 CLJ 1157 where the court awarded RM7,500, the plaintiff prayed for RM8,000. In respect of the head injury, since the plaintiff was of the view that he sustained a concussion, he asked for RM3,000. It was Mr Manikam's submission that I should make separate awards for each of the items.

Mr Khoo for the defence grouped the injuries into four categories. Under the first category, he grouped injuries to the femur, acetabulum with central dislocation and the sciatic nerve injury with the residuals. He referred me to *Wong Yeen Pen v Sharifudin bin Yusof* [1989] 2 CLJ 1098 wherein LC Vohrah J awarded a sum of RM40,000 having compared similar injuries with that of an award for an amputated leg and thereby reasoning that whilst for an amputated leg, the award was RM50,000, in

the case before him, since the plaintiff still had 'the facility of walking on both his legs', the award ought to be less. Mr Khoo suggested a figure of RM35,000.

For the wrist injury, he referred me to *Chua Tek Lah v Chua Seow Cher* [1988] 1 MLJ xxxvi where the deputy registrar in Singapore awarded S$6,000 for a fracture of the radius and ulnar. The defence offered RM7,000. Under the third group of injuries was placed the mandible fracture. Relying on *Gan Kiam Beng v Haji Senan* [1987] 2 MLJ xxi wherein for bilateral fractures of the mandible with slurred speech Eusoff Chin J (as the learned Chief Justice then was) awarded a sum of RM9,000, the defendant submitted RM10,000. For the head injury, he suggested RM1,000.

Whilst I propose to accept the categorization of the injuries as suggested by the defence for the purposes of giving guidelines to lawyers and insurers involved in this field of third party claims, I must not fail to over-emphasize the need to give a global award notwithstanding the fact that the four groups of injuries as proposed by the defence relate to different parts of the human anatomy. The principle of making a global award was highlighted by Mohd Azmi FCJ in *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50 (FC). Whilst I am not unaware that in *Tay Tong Chew* the plaintiff's injuries were confined to the hip and to the tibia and fibula, the reasonableness of the principle of making a global award must still remain the same. Because the injuries in the case before me relate to various parts of the anatomy, a break up of the award into the various categories seems justifiable, more so as a guide to practitioners, and before the process of overlapping is applied, to bring about a just global award.

For the first category, I award the sum of RM35,000. This sum should more than compensate for the injuries sustained. In comparing with an amputee of a leg above the knee where the minimum award is RM50,000, and considering the fact that the plaintiff is still ambulant, the award is appropriate.

For the wrist injury which has healed with no residuals, I award a sum of RM7,000. In respect of the third category, that is the bilateral fracture of the mandible, I award RM10,000. As for the head injury, other than the mere fact that the report states 'he sustained head injury' and that the first plaintiff was duly observed for 24 hours after which he completely recovered, there is no evidence of any concussion or head injury. If not for Mr Khoo's concession of RM1,000, I would have been disinclined to make any award.

At this stage, I must consider Mr Manikam's plea that I award damages for the scars and osteoarthritis. I make no award for the scars. The scars were as a result of the operations conducted. They become an integral part of the award that has already been made. An express award of damages of the scars which arose out of the need to operate, is a clear example of duplicating awards. I will however make the conventional award of RM3,000 for the osteoarthritis.

The total award comes to RM56,000. Mr Khoo suggests a 10% discount for overlapping. In my book, *Practical Approach to Assessment of Liability and Damages in Tort* (Malayan Law Journal, 1986), I said this at p 269:

> It would seem that, in common practice, the courts scale down the awards in cases where the injuries are all centralised in one area, namely the face or the hand or the leg. But if the plaintiff suffers injuries to different parts like the face and the hand and the leg, the courts usually make separate heads of awards for the three areas and then make a lump sum award taking into consideration the principle of overlapping.

I have no reason to change that view which is still good law. However, there should not be a mechanical application of a fixed 10% or 20% deduction for overlapping. Overlapping is to be considered where there are multiple injuries because the general handicaps, discomfort, pain and suffering, detention in hospital, inability to move about or enjoy recreation could be common to any or all of the injuries sustained. An unfaltered discretion must be given to the court hearing the same to take off a certain sum for overlapping. In the exercise of my discretion, it is my judgment that a sum of RM50,000 being a global amount is fair and reasonable.

Special damages

At the commencement of the trial, the defence agreed to the medical expenses of the first plaintiff as amounting to RM15,429 subject to the defence raising the question of reasonableness. Mr Khoo submitted that I should allow just one-third the sum. He relied on *Peraganathan a/l Karpaya v Choong Yuk Sang & Anor* [1996] 1 CLJ 622 where my learned brother Chin Fook Yen JC (as he then was) held that when a court is called upon to determine whether or not the expenses incurred in a private hospital should be allowed in a particular case, the court should not rely on medical advice solely as such, but ought to also consider whether the hospital concerned is ready and able to provide adequate facilities, expertise and treatment to the patient. In the case before him, he found that there was no necessity to have the plaintiff's leg amputated and that further the plaintiff had not produced any evidence to satisfy the court that a state of affairs existed in Teluk Intan District Hospital then so as to give rise to such apprehension. He then roughly awarded one-third the sum claimed. Mr Khoo thus suggested the figure of RM5,000.

On principle, I accept and endorse the view expressed by my learned brother, Chin Fook Yen JC. I decline to follow the decision in *Chong Kam Siong v Herman bin Baharuddin* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1262 relied on by the plaintiff, where according to the editor's note, the learned judge is reported to have allowed a claim of RM43,070 which was equivalent to the sum spent by the plaintiff who discharged himself from a government hospital in Johor Bahru and had himself admitted to a Singapore hospital. His Lordship is reported to have held that the hospital in Singapore should be treated like other private hospitals in Malaysia and thereby allowing for the full medical expenses.

The district government hospitals of today are equipped with sufficient manpower and equipment to treat victims of accidents. However, if further expertise or sophisticated equipment are required in a particular case, the victim is invariably sent by ambulance to the main referral centre in the state. Therefore, it cannot be gainsaid that treatment from government hospitals is second to none. Needless to say that paying patients of private hospitals are accorded personal facilities and accommodation in conformity with their paying status. What should be considered by the court is the treatment accorded, not the accommodation provided.

In any event, in the case before me, the reason the first plaintiff went to Tawakal Hospital where he expended a sum of RM15,429 was because University Hospital did not attend to an injury to his right leg. Yet, he did not provide any report or letter from Tawakal Hospital to show that such was indeed the case. A mere assertion without documentary evidence must result in this court rejecting this claim totally. The other specials amounting to RM750 have been agreed. I also award the sum of RM9,000 being costs of future operations (see Dr Teo's report).

Loss of earnings

I reject the claim by the first plaintiff that he was earning RM1,200 per month as a shoemaker at the time of the accident. Whilst his evidence was that he was paid RM2.50 per pair of shoes and that he manufactured between 20–30 pairs a day, and he worked six days a week, which means he averaged an income of between RM1,200 to RM1,440 per month, yet the employer's letter states that his wages were RM1,000. Firstly, if the plaintiff was employed on contract basis, the letter would not have referred to the earnings as 'wages'. The *Concise Oxford Dictionary* (9th Ed) defines wage as a fixed regular payment, usually daily or weekly, made by an employer to an employee especially to a manual or skilled worker. I have no doubt that the first plaintiff did work for PW3 but a more probable figure would be RM700 a month as wages.

Since the first plaintiff was unemployed for one year, I award him RM700 x 12 = RM8,400. I reject the first plaintiff's submission that he was subsequently employed by 'Exclusive Enterprise' where he claimed he was paid only RM300. Whilst contending that the employer was available, he preferred not to call him nor tender any letter from him. I have no hesitation in invoking s 114(g) of the Evidence Act 1950 against him. In any case, soon thereafter he joined 'Ware Enterprise' where he was paid RM700 for doing the same light job as he did at 'Exclusive Enterprise'. In other words, there is no possible loss of future earnings.

Is there loss of earning capacity?

Whilst it is true that the first plaintiff has not pleaded for loss of earning capacity, I do not think that it is beyond this court, in the interest of justice, to make such an award, if evidence produced would justify it. The first plaintiff has indeed sustained serious injuries, the aftermath of which has been clearly spelt out by Dr Teo. Further, he was gainfully employed

at the time of the accident. The proper test to be employed in respect of an award for loss of earning capacity is whether sometime in the future, due to the effect of the injuries sustained by him, the plaintiff would face a substantial risk of either losing his job or getting a less paid employment. Before the Civil Law Act 1956 was amended in 1984, it mattered not whether the plaintiff was in employment or not at the time of the accident so long as the court was satisfied from evidence adduced that there was a real or substantial risk that his earning capacity would be affected in the future. However, after the amendment, it is an essential prerequisite of s 28A(2)(c)(i) that in awarding damages for loss of future earnings or loss of earning capacity, there must be proof that the claimant was receiving earnings by his own labour or other gainful activity prior to the accident. In this respect, I rely on the clear enunciation of this principle by the (then) Supreme Court in *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 wherein the then Lord President, Abdul Hamid Omar LP said at p 44:

> ... We reiterate that s 28A(2)(c)(ii) which states that 'only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of earnings aforesaid being increased at sometime in the future', makes the intention of the legislature abundantly clear and indeed the legislature had the prospect of future earnings (whatever be the label attached to it) in mind when the law was enacted.

The use of the words 'whatever be the label attached to it' in my view provides for an award of loss of earning capacity notwithstanding the fact that evidence discloses no loss of future earnings. I therefore award a sum of RM300 for ten years' loss of earning capacity which amounts to RM36,000.

The second plaintiff

The second plaintiff's medical report from University Hospital is to the effect that, on admission, he was restless, having had loss of consciousness and amnesia. A CT scan showed diffuse brain swelling with compression of ventricles. No obvious intracranial hematoma was seen. He was admitted to the ICU where he was ventilated and paralysed for cerebral resuscitation. Three days later, he was intubated and woke up talking and obeying commands. He was transferred back to the ward and discharged two days later with 'just some amnesia'. When he was seen a month later in the clinic, other than the amnesia, he was found well.

He was also referred to Dr Teo. I rejected Dr Teo's opinion regarding the head injury on the basis that such comments ought to be reserved for a neurosurgeon and not an orthopaedic surgeon. There was no other significant orthopaedic comment from Dr Teo.

A specialist report was produced by Dr Arumugasamy, a neurosurgeon. His findings were that this plaintiff had sustained a moderately severe head injury resulting in periods of confusion and restlessness. He confirmed that the EEG and CAT scan findings appeared

normal. He confirmed that the plaintiff suffered from vasomotor instability characterised by headaches and giddiness, especially on awakening. The latter was aggravated by hot afternoons. He has lost some confidence in himself and his lack of concentration appears to have impaired his work. He concluded that the plaintiff ran a 30% chance of developing seizures in future in view of the ventilatory support he had previously. Relying on *Khairul Anuar bin Abu Bakar v Lim Eng Choon* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1260, the plaintiff submitted for a sum of RM75,000 for general damages.

The defendant relied on *Tominam bte Tukimin v Toh Kai Chup* [1985] 2 MLJ 345 and suggested a sum of RM35,000.

To my mind both the cases cited by counsel show that, in each of the cases, the plaintiff had sustained more serious brain damage. However, since the defence had suggested a sum of RM35,000, I will make that award.

Special damages

It is clear to me that the second plaintiff was never gainfully employed and that he was a student at the time of the accident. He admitted under cross-examination that he had no documentary evidence to show that he was in fact gainfully employed. Even PW3, the purported employer, was unable to produce any evidence of employment, even though the second plaintiff said that PW3 would have the invoices to substantiate his sales. What is significant was that PW3 gave a letter confirming the first plaintiff's employment but did not give a similar letter in respect of the second plaintiff. When asked why he did not do so, he said that he had negligently left out the name of the second plaintiff. Surely, even if he was negligent in having omitted the second plaintiff's name from the said letter, it was incumbent upon the second plaintiff and/or his legal advisers to have obtained the same. Alternatively, PW3 could have been served with a *subpoena duces tecum* to produce the documents. Instead, a perusal of the court file shows that no subpoena was issued to PW3 at all. Further, the fact that counsel for the plaintiffs sought to include, on the day of the trial, a prayer for loss of earnings for the second plaintiff at RM1,500 per month, clearly illustrates the insincerity of the second plaintiff towards this claim. To my mind, this was a shot in the dark. I do not find the second plaintiff a witness of truth. He has denied his own admission to both the specialists. To Dr Teo, he had said that at the time of the accident he was a student and that since the recovery from his injury, he had left school and started work as a salesman. This clearly meant he was unemployed at the time of the accident; that is why even in the statement of claim filed on 21 November 1990 he did not claim for loss of earnings. Under cross and on re-examination, he denied making this statement to Dr Teo. He had told Dr Arumugasamy, the neurosurgeon, that he was paid RM50 a day by his brother. In court he denied it was per day. In any event, it is preposterous to even imagine that a school boy working from 2pm to 8pm could earn RM1,500 per month. Even PW3 never gave a letter that he was employed.

Since I have made a finding that he was not gainfully employed, I cannot even consider loss of earning capacity.

The rest of the specials have been agreed to at RM250.

To summarize, my judgment is as follows:

The first plaintiff

(a)	General damages	RM50,000
(b)	Special damages	
	(i) Medical expenses	Nil
	(ii) Other specials agreed	RM750
	(iii) Cost of future operations	RM9,000
	(iv) Loss of actual earnings	RM8,400
	(v) Loss of earning capacity	RM36,000

The second plaintiff

(a)	General damages	RM35,000
(b)	Special damages	
	(i) Loss of actual earnings	Nil
	(ii) Loss of earning capacity	Nil
	(iii) Other specials	RM250

I award interest as follows:

For general damages, interest at 8% pa from date of service of writ to date of judgment.

For special damages, namely for first plaintiff, for items (ii) and (iv), and for the second plaintiff for item (iii) only, interest at 4% pa from date of accident to date of judgment.

Regarding costs, I was minded to award costs at subordinate court scale since the total amount of damages falls within the jurisdiction of the sessions court. My attention however has been drawn to Practice Direction No 4 of 1994 by my deputy registrar which states that notwithstanding the amendment to the Subordinate Courts Act 1948 which came into effect on 24 June 1994, all running down matters which have already been filed in the High Court ought to remain thereat and to be disposed of thereat. In the circumstances, I am awarding the normal High Court costs to be agreed or taxed.

Order accordingly.

Reported by David Lai